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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 13 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
Amendment of the Commission's)
Rules to Establish New)
Personal Communications Services)

Gen. Docket 90-314

TO: The Commission

**AMERICAN PERSONAL COMMUNICATIONS
REPLY TO OPPOSITIONS TO
PETITIONS FOR RECONSIDERATION**

This docket now has been open for almost four years, with innumerable pleadings having been filed by scores of parties. The last round of filings provides no basis for making fundamental changes in the Commission's correct decisions on PCS spectrum allocation and licensing area issues.^{1/} American Personal Communications ("APC")^{2/} urges the Commission to deny petitions that seek to shrink PCS spectrum allocations and licensing areas because these proposals would undermine the Commission's plan for PCS and limit the potential of PCS. The Commission should make only limited changes in its PCS Order, including increasing permissible base station power and reserving 38 GHz microwave spectrum for PCS backhaul.

^{1/} We would still prefer 40 MHz license blocks, but 30 MHz blocks are reasonable -- particularly if the Commission adopts the PCS Action/Time Warner Telecommunications proposal to permit PCS licenses to aggregate up to 40 MHz per market using the 20 MHz allocation in the 1850-1970 MHz band.

^{2/} American PCS, L.P., d/b/a American Personal Communications ("APC"), a partnership in which APC, Inc. is the managing general partner and The Washington Post Company is an investor/limited partner.

I. POWER LIMITATIONS AND TECHNICAL RULE ADJUSTMENTS

The consensus in favor of raising the permissible base station power for PCS to 1,000 watts ERP (1,600 watts E.I.R.P.) is overwhelming.^{3/} Importantly, the groups representing the microwave industry -- the Fixed Point-to-Point Communications Section of the Network Equipment Division of the Telecommunications Industry Association ("TIA"), the Utilities Telecommunications Council ("UTC") and the Association of American Railroads ("AAR") -- do not oppose an increase in the power limitations applicable to PCS. These groups make only the reasonable request that incumbents be assured an equivalent level of interference protection when power limitations are increased, a request with which we wholeheartedly agree and which can and will be satisfied under the proposals submitted by APC.^{4/} APC also recommended revisions in other technical requirements and supported the recommendations of other parties. The Commission should grant

^{3/} The increase in power proposed by APC, Telocator and others was supported by MCI, GTE, Bell Atlantic, Pacific Bell/Nevada Bell (which proposed an even higher limit of 1900 watts EIRP), Northern Telecom, General Communication, Inc., and Citizens Utilities Co. The sole dissenter appears to be Nextel, which opposes any element of the Commission's decision that would permit a full-featured, capable PCS to emerge.

^{4/} The PCS-OFS coordination distances adopted by the Commission in Table 2 of new Section 99.233(a) are based upon a maximum PCS base station power of 100 watts EIRP. If, as we propose, a higher PCS base station power limit is adopted, then the PCS-OFS coordination distances should be modified. APC has proposed that the Commission adopt the coordination distance calculation method proposed for Annex F of TIA Bulletin 10-F, and no party has objected to this proposal. See APC Petition for Reconsideration, p. 8.

the petitions that requested an increase in PCS power limits and should adopt the technical modifications proposed by APC and Telocator.

On a related matter, Apple Computer, Inc., at the 59th minute of the 11th hour, now asks the Commission to limit the power of all PCS base stations "in the five MHz on either side of the unlicensed band" to "no more than two watts under all conditions" (p. 5) to protect unlicensed PCS from interference. PCS base stations cannot, of course, provide full-mobility service to the public at only two watts. Apple's proposal (which, notably, is not joined by UTAM, WinForum, or any other unlicensed PCS proponent) effectively would delete 10 MHz from the scarce spectrum the Commission has allocated for big-vision PCS.

There is no basis for Apple's unsubstantiated insecurity that licensed PCS interference at the reasonable power levels proposed in this docket will "obliterate" unlicensed PCS. The Commission has adopted emission limitations for PCS to prevent such interference. Apple has made no showing at all, technical or otherwise, that these limitations would be ineffective to prevent licensed PCS from interfering with unlicensed PCS. Apple has wholly failed to prove the potential for any such interference. If the Commission wishes to provide additional assurance to Apple, however, it could adopt Telocator's proposed in-band emission limitations for licensed PCS, which APC supports.

II. SPECTRUM ALLOCATION

The oppositions demonstrated no reasoned support whatsoever for minimizing PCS spectrum allocations. The 30 MHz PCS allocations the Commission has created are, simply, necessary to permit "big vision" PCS to be implemented in the United States. Reducing these allocations would minimize the number of Americans that can be served by PCS, minimize the quality of PCS service, minimize the chances for PCS ever competing with cellular or the local loop, minimize the impact of PCS on our domestic economy and international balance of trade, and slow down PCS. The record clearly supports a reaffirmation of the Commission's spectrum allocation for PCS.^{5/}

The Cellular Telecommunications Industry Association ("CTIA") now desperately seeks to resuscitate its moribund argument that PCS must be wedged into small spectrum blocks that cannot support a service that would compete with CTIA's constituency. All that is new (and the tactic is, regrettably, not new for CTIA) is its shameless misrepresentation of APC's own studies. CTIA claims that "the record demonstrates that 10 MHz permits operations of minimum efficient scale" (p. 10) based on an APC study that CTIA mischaracterizes as demonstrating that "even without microwave

^{5/} We agree with PCS Action and Time Warner Telecommunications, however, that licensees in the 1850-1970 MHz band, including the 20 MHz licensee, should be permitted to use their spectrum flexibly to allow aggregation of up to 40 MHz of spectrum in that band.

relocation, all 20 MHz licensees would have access to at least 10 MHz -- minimum efficient scale" (p. 12).

The Commission well knows that APC's spectrum availability study demonstrates precisely the opposite conclusion -- that 20 MHz is woefully insufficient for a workable PCS allocation (and that it is nonsense, at any rate, to claim that 10 MHz is sufficient for PCS).^{5/} With an allocation of only 20 MHz, there would be 10-12 MHz available on average in the top 11 U.S. markets.^{7/} But this average does not mean that 10 MHz would be available in all areas, as CTIA claims; far from it. In fact, microwave usage may completely block PCS implementation in large geographic areas of a

^{5/} There is no record support whatsoever for a 10 MHz allocation in the 1850-1970 MHz band. No major party ever has argued in favor of such small allocations until the last filings by CTIA and Nextel (which, of course, do not support their rhetoric with a whit of original research). Although our disagreement with Bell Atlantic's "6 x 20" approach is well established, we do agree completely with Bell Atlantic that "the record does not 'amply support the efficiency of a 10 Mhz allocation' as CTIA suggests" (p. 6) and that the "CTIA and Nextel positions on reconsideration are strange" (p. 7). The Commission should bear in mind the critical distinction between a 10 MHz allocation in the 2200 MHz band -- where microwave licensees utilize very narrow bandwidths that PCS licensees can work around, and in which a 10 MHz allocation would be sufficient for niche services or cellular add-on services -- and a 10 MHz allocation in the 1850-1970 MHz band, where such a small allocation could be entirely stymied by the presence of a single incumbent microwave user, blocking PCS for at least three years (or permanently, if that incumbent is a grandfathered public-safety licensee).

^{7/} See American Personal Communications, Report on Spectrum Availability for Personal Communications Services Sharing the 1850-1990 MHz Band with the Private Operational Fixed Microwave Service, p. 27 (filed in Gen. Docket 90-314, November 1992).

market. APC's study reported that under a 20 MHz allocation, contrary to CTIA's misrepresentations, zero megahertz would be available in up to 40 percent of the land area of New York (including the entire island of Manhattan); zero megahertz would be available in up to 55 percent of the land area of Los Angeles; zero megahertz would be available in up to 20 percent of the land area of Boston (including the entire center city); zero megahertz would be available in up to 57 percent of the land area of Chicago; zero megahertz would be available in up to 49.9 percent of the land area of Dallas; zero megahertz would be available in up to 44 percent of the land area of San Francisco; zero megahertz would be available in up to 29 percent of the land area of Philadelphia; and zero megahertz would be available in up to 46 percent of the land area of Houston.^{8/} Even in CTIA's world of doublespeak, zero MHz does not constitute "minimum efficient scale."

It is quite obvious why CTIA would advocate such an approach. Cellular carriers, which have been granted clear spectrum by the Commission, can offer seamless service over entire regional areas. PCS licensees cannot launch service at all until they can offer the public a competitive alternative. If PCS is handicapped by a 20 MHz allocation, enormous gaps in coverage would be inevitable. Under these conditions, it would be impossible for effective PCS to launch for years. PCS never could be competitive with cellular, and would be

^{8/} See id. at 30.

denied the opportunity to grow into a service that could provide competition to the local loop monopoly in the United States. The Commission should support a competitive and vibrant PCS and reaffirm its spectrum allocation for PCS.

III. STANDARDS AND DELAY

In its PCS Order, the Commission wisely decided that imposing standardization requirements upon PCS would stifle innovative technologies. The Commission correctly decided to permit the marketplace and the industry to guide the development of PCS. All potential PCS providers filing in this docket oppose the new plea by Motorola and TIA (now joined, to our regret, by Qualcomm) to stop the deployment of PCS in this country until the end of a long and laborious standards process.^{2/} The U.S. telecommunications industry, which could and should be leading the world in PCS technology, should not resort to pleading to the federal government to stop its competitors but rather should redouble its efforts to win in the marketplace. The Commission should reject this attempt to replace the rigors of the marketplace with the tender mercies of a standards process (which would be controlled, at least, initially, by PCS' cellular competitors).

IV. PRIVATE PCS ALLOCATION

APC's opposition to the proposal by UTC and the Association of Public-Safety Communication Officials ("APCO")

^{2/} The Motorola/TIA proposal was opposed by APC, MCI, GTE, Northern Telecom and Nextel; it was not supported by any party other than Motorola and Qualcomm.

to establish a "private PCS" allocation was joined by numerous other parties. A petition for rule making now has been filed by COPE, an organization to which both UTC and APCO belong.^{10/} The COPE petition asks the Commission to reserve 75 MHz of the 200 MHz that will be transferred to the FCC's jurisdiction from federal government use under the Omnibus Budget Reconciliation Act of 1993 to an "advanced private land mobile communications service." The COPE petition is the appropriate procedural device to pursue a "private PCS" allocation. Accordingly, the UTC and APCO request for a reservation of spectrum from the scarce spectrum the Commission has allocated for licensed PCS need not be granted to serve private needs.

V. RAND McNALLY COPYRIGHT ISSUE

Rand McNally & Co. claims that it has the right to stop the Commission from defining PCS service areas based on basic trading areas ("BTAs") and major trading areas ("MTAs") because Rand McNally's listings of counties within BTAs and BTAs within MTAs constitute copyrightable "compilations" under the Supreme Court's decision in Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991). This assertion is puzzling, as Feist stands for precisely the opposite proposition. Under copyright law, it is clear that the Commission has the right to define PCS service areas based

^{10/} See Coalition of Private Users of Emerging Multimedia Technologies ("COPE"), Petition for Rule Making (filed Dec. 23, 1993).

on the underlying facts and ideas behind BTAs and MTAs regardless of whether Rand McNally consents.

In Feist, the Supreme Court held that a compilation of subscriber information in a telephone directory was not a copyrightable compilation. The Court began by reaffirming the long-standing proposition that facts and ideas are not copyrightable. See id. at 345-47. Because the underlying facts and ideas of any compilation are not copyrightable, "[t]his inevitably means that the copyright in a factual compilation is thin." Id. at 349. Others are free to use the essential ideas underlying the compilation to create other compilations:

No matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or propose the ideas.

Id. at 349 (citation omitted).

The proposal by Telocator that the Commission simply publish the underlying ideas of which counties are placed in which BTA is precisely the type of use of underlying uncopyrightable facts or ideas that is permissible under Feist. This is even more clear in light of the fact that the Commission's PCS Orders do not adopt the Rand McNally BTA-MTA plan wholesale, but alter several licensing areas and create several licensing areas that do not exist under the Rand McNally plan. The Commission's PCS licensing plan properly

adapts the MTA/BTA idea to PCS licensing, and may go forward regardless of whether Rand McNally consents.

* * *

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